

# Judicial Council of California • Administrative Office of the Courts

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## INVITATION TO COMMENT SPR13-31

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Title	Action Requested
Subordinate Judicial Officers: Complaints and Notice Requirements	Review and submit comments by June 19, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 10.703	January 1, 2014
Proposed by	Contact
Trial Court Presiding Judges Advisory Committee Hon. Laurie M. Earl, Chair	Mark Jacobson, 415-865-7898 mark.jacobson@jud.ca.gov

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### Executive Summary and Origin

The Trial Court Presiding Judges Advisory Committee proposes amendments to rule 10.703 of the California Rules of Court that would (1) simplify the procedures a presiding judge must follow while reviewing and investigating complaints against subordinate judicial officers (SJOs); (2) clarify a presiding judge's authority in conducting an investigation and determining the appropriate action to be taken; and (3) clarify the circumstances under which discipline against an SJO must be reported to the Commission on Judicial Performance (CJP).

### Background

In March 2010, Victoria B. Henley, Director–Chief Counsel of the CJP, sent a letter to then–Administrative Director of the Courts William C. Vickrey suggesting that rule 10.703 be amended to address an ambiguity in the rule as to what types of disciplinary action a presiding judge can impose after a preliminary and a formal investigation and what types of action must be reported to the CJP. The Trial Court Presiding Judges Advisory Committee concluded that it could address this issue by eliminating the current two-tiered preliminary/formal investigation process and replacing it with one investigation.

### The Proposal

The proposed amendments to rule 10.703 would simplify the procedures a presiding judge must follow while reviewing and investigating complaints against SJOs. They would also clarify a presiding judge's authority and options in investigating and resolving a complaint. Finally, the amendments would clarify under what circumstances a report must be filed with the CJP.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

### **Replacing two-tier investigation process with one investigation**

The current rule requires a presiding judge to review each complaint to determine whether it should be closed or investigated further. The rule provides that if initial review by the presiding judge shows that a basis for further investigation exists, the presiding judge must conduct a preliminary investigation. (Rule 10.703(i).) If the presiding judge, after conducting the preliminary investigation, “finds a basis for proceeding with the investigation,” he or she must then conduct a formal investigation. (Rule 10.703(j).)

Under the proposed amendments, there would be just one investigation if the presiding judge determines after initial review that there is a basis for an investigation. As with current subdivision (i)(3), the presiding judge would be required to give the SJO an opportunity to respond to the allegations before the presiding judge takes any disciplinary action. After reviewing the response and completing the investigation, the presiding judge would close the matter, impose discipline, or take any other appropriate action.

The actual investigation procedure would not change except that there would be one investigation instead of two. However, one element of the post-investigation procedure would be eliminated. Currently, within 10 days or as soon as reasonably possible after completion of the investigation, the presiding judge must give the SJO a notice of the intended final action on the complaint and an opportunity to respond. (Rule 10.703(j)(2), (4), and (5).) The revised rule would delete this requirement, but SJOs would still have an opportunity under subdivision (i)(3) to respond to the allegations of misconduct.

### **Simplifying the rule and clarifying the presiding judge’s authority in resolving complaints**

In addition to being unnecessarily complicated, the rule as it is currently written does not afford a presiding judge enough discretion in processing and resolving a complaint. The rule provides that after a preliminary investigation, the presiding judge may close the matter, proceed to a formal investigation, or take “appropriate informal action, which may include a reprimand or warning . . .” (Rule 10.703(i)(4).) After a formal investigation, if the presiding judge decides to take action, the rule lists various types of final action a presiding judge may take, including no action, an oral or written warning, a private or public reprimand, suspension, termination, or any other action the court deems appropriate. (Rule 10.703(j)(3).)

To simplify the rule and clarify the presiding judge’s authority in determining the appropriate action, the amendments would eliminate the list of possible actions available to the presiding judge. Instead, the rule would simply provide that after an investigation, the presiding judge “must, in his or her discretion: (A) Close action on the complaint if the presiding judge finds the complaint lacks merit; (B) Impose discipline; or (C) Take other appropriate action.” (Proposed rule 10.703(i)(4).) This change would diminish the perception that a presiding judge is limited by the list of possible actions or that the SJO is entitled to progressive discipline.

The amendments would also add a provision specifying that a presiding judge has discretion to investigate complaints that are anonymous. (Proposed rule 10.703(f)(3).) This new provision

would change no other obligation a presiding judge has to investigate allegations of serious misconduct brought to his or her attention. Rather, it would clarify the notion that a presiding judge is not obligated to investigate an anonymous complaint that provides insufficient facts to launch an investigation or that does not allege conduct that violates any ethical principles.

Finally, when a presiding judge closes a complaint after initial review under subdivision (h)(1) without having contacted the SJO, this proposal would delete the requirement in subdivision (h)(3) that the presiding judge “must advise the subordinate judicial officer in writing of the disposition.” Under the current rule, nothing requires a presiding judge to notify an SJO of a complaint *unless* the presiding judge intends to take some type of “informal action” or to impose discipline. (See rule 10.703(i)(3) and (j)(1)(B).) In the committee’s view, if a complaint relates to the permissible exercise of discretion by the SJO or alleges conduct that, if alleged against a judge, would not be within the jurisdiction of the CJP (rule 10.703(h)(1)), and the SJO is unaware of the complaint, the presiding judge should not be required to advise the SJO of the disposition of the complaint.

Similarly, a presiding judge could investigate a complaint and close the matter without asking the SJO to respond to the allegations. For example, the presiding judge could listen to a recording of a hearing and determine, without contacting the SJO, that an allegation of poor demeanor was unmeritorious. Therefore, subdivision (j)(6) (which would be renumbered as (i)(5) under the proposed revisions) would be amended to require a presiding judge to give to the SJO written notice of the final action taken only if the presiding judge is aware that the SJO knows about the complaint.

By eliminating the two-tiered investigation and simplifying the rule as described, the proposed amendments would address CJP Director–Chief Counsel Henley’s concern that the rule is ambiguous as to what types of disciplinary action can be imposed after an informal and a formal investigation.

### **Asking CJP to investigate and adjudicate complaints**

Current subdivision (g)(2) provides that a presiding judge “may request that the commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint.” Current subdivision (g)(3) states: “In exceptional circumstances a presiding judge may request the commission to investigate a complaint on behalf of the court and provide the results of the investigation to the court for action.”

The amendments would expand the circumstances under which a court may request that the commission investigate and adjudicate a complaint by deleting subdivision (g)(2) and changing (g)(3) to say: “In his or her discretion, a presiding judge may request the commission to investigate and adjudicate a complaint on behalf of the court, or to investigate a complaint on behalf of the court and provide the results of the investigation to the court for adjudication.” If subdivision (g)(3) is expanded so that a presiding judge can, “[in] his or her discretion,” request the commission’s assistance, (g)(2) becomes superfluous. This amendment would permit a

presiding judge to ask for the commission's help if, for example, the court lacks the resources to conduct an investigation.

### **Other amendments**

The proposed amendments would add several other provisions to the rule. First, subdivision (a)(4) would state specifically that the procedure for addressing complaints does not entitle the SJO to progressive levels of discipline.

Second, the proposed amendments would add a definition of "written reprimand" to the rule. (Proposed rule 10.703(b)(4).) That term is used currently in subdivision (k)(1), which requires a presiding judge to report an SJO to the commission when the presiding judge disciplines the SJO by written reprimand, suspension, or termination.

Third, current subdivision (l), which states what the presiding judge must tell the complainant and the SJO after the matter is resolved, would be amended to state that if the complainant is unknown, either because the matter did not come to the attention of the presiding judge as a result of a complaint or because the complainant is anonymous, the presiding judge need not notify the complainant. A similar revision would be added to proposed subdivision (f)(4), which requires written notice to a complainant of receipt of a complaint. The revision would add the words "if known" to clarify that notice is required only if the complainant is known.

Fourth, subdivision (b)(1) defines "subordinate judicial officer" as an attorney employed by a court to serve as a commissioner or referee. The amendments would add "hearing officer" to that definition. (See Cal. Rules of Court, rule 10.701(a).)

Finally, in subdivision (l)(1), the amendments would delete the phrase "and the subordinate judicial officer" so that the presiding judge would be required to notify only the complainant, not the SJO, of the final court action. This notification to the SJO in this provision is duplicative because subdivision (j)(6) (proposed subdivision (i)(5)) already requires such notification to the SJO.

### **Alternatives Considered**

The Trial Court Presiding Judges Advisory Committee considered and rejected a suggestion by Director–Chief Counsel Henley that the rule be amended to specifically permit courts to commence an investigation based on oral complaints. The committee noted that if an oral complaint alleges conduct that constitutes a violation of the Code of Judicial Ethics, under canon 3D(2) of the code, a presiding judge would be obligated to investigate the complaint and take appropriate corrective action if the presiding judge has reliable information that the SJO violated any provision of the Code of Judicial Ethics. Therefore, an amendment "permitting" a presiding judge to consider an oral complaint is not needed.

### **Implementation Requirements, Costs, and Operational Impacts**

The proposed amendments would result in no costs. Replacing the current two-tiered investigation with a single investigation would reduce the burden on a presiding judge.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?

### **Attachment**

1. Text of proposed Cal. Rules of Court, rule 10.703, at pages 6–11

Rule 10.703 of the California Rules of Court would be amended, effective January 1, 2014, to read as follows:

1 **Rule 10.703. Subordinate judicial officers: complaints and notice requirements**

2  
3 **(a) Intent**

4  
5 The procedures in this rule for processing complaints against subordinate judicial officers  
6 do not:

- 7  
8 (1) Create a contract of employment;  
9  
10 (2) Change the existing employee-employer relationship between the subordinate  
11 judicial officer and the court; ~~or~~  
12  
13 (3) Change the status of a subordinate judicial officer from an employee terminable at  
14 will to an employee terminable only for cause; or  
15  
16 (4) Entitle a subordinate judicial officer to receive progressive levels of discipline.

17  
18 **(b) Definitions**

19  
20 Unless the context requires otherwise, the following definitions apply to this rule:

- 21  
22 (1) “Subordinate judicial officer” means an attorney employed by a court to serve as a  
23 commissioner, ~~or~~ referee, or hearing officer, whether the attorney is acting as a  
24 commissioner, referee, hearing officer, or temporary judge. The term does not  
25 include any other attorney acting as a temporary judge.

26  
27 (2)–(3) \*\*\*

- 28  
29 (4) “Written reprimand” means written disciplinary action that is warranted either  
30 because of the seriousness of the misconduct or because previous corrective action  
31 has been ineffective.

32  
33 **(c) Application**

34  
35 (1) \*\*\*

- 36  
37 (2) If a complaint against a subordinate judicial officer as described in (f) does not allege  
38 conduct that would be within the jurisdiction of the commission, the ~~court must~~  
39 ~~process the complaint following~~ local procedures adopted under rule 10.603(c)(4)(C)  
40 apply. The local process may include any procedures from this rule for the court’s  
41 adjudication of the complaint other than the provisions for referring the matter to the  
42 commission under (g) or giving notice of commission review under ~~(h)(k)~~(2)(B).

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(3) \*\*\*

(d)–(e) \*\*\*

**(f) Written complaints to presiding judge**

(1) A complaint about the conduct of a subordinate judicial officer must be in writing and must be submitted to the presiding judge.

(2) \*\*\*

(3) The presiding judge has discretion to investigate complaints that are anonymous.

(4) The presiding judge must give written notice of receipt of the complaint to the complainant, if known.

**(g) Initial review of the complaint**

(1) The presiding judge must review each complaint and determine if the complaint:

(A) May be closed after initial review;

(B) ~~Needs preliminary investigation~~ Requires investigation by the presiding judge;  
or

(C) ~~Requires formal investigation~~ Should be referred to the commission for investigation or for investigation and adjudication.

(2) ~~A presiding judge may request that the commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint.~~

(3) ~~In exceptional circumstances~~ his or her discretion, a presiding judge may request the commission to investigate and adjudicate a complaint on behalf of the court, or to investigate a complaint on behalf of the court and provide the results of the investigation to the court for ~~action~~ adjudication.

(4)(3) The court must maintain a file on every complaint received, containing the following:

(A)–(D) \*\*\*

1 (h) Closing a complaint after initial review

2  
3 (1) After an preliminary initial review the presiding judge may close without further  
4 action any complaint that:

5  
6 (A)–(B) \*\*\*

7  
8 (2) If the presiding judge decides to close the complaint under (h)(1), tThe presiding  
9 judge must notify the complainant in writing of the decision to close ~~the~~  
10 ~~investigation on~~ the complaint. The notice must include the information required  
11 under ~~(l)~~(k).

12  
13 (3) The presiding judge ~~must~~ may, in his or her discretion, advise the subordinate  
14 judicial officer in writing of the ~~disposition~~ decision to close the investigation on the  
15 complaint.

16  
17 (i) Complaints requiring ~~preliminary~~ investigation

18  
19 (1) If after an initial review of the complaint the presiding judge finds a basis for further  
20 inquiry, the presiding judge must conduct an preliminary investigation appropriate to  
21 the nature of the complaint.

22  
23 (2) \*\*\*

24  
25 (3) The presiding judge may give the subordinate judicial officer a copy of the complaint  
26 or a summary of its allegations and allow him or her an opportunity to respond to the  
27 allegations. The presiding judge must give the subordinate judicial officer a copy of  
28 the complaint or a summary of its allegations and allow the subordinate judicial  
29 officer an opportunity to respond to the allegations before the presiding judge takes  
30 ~~appropriate informal~~ any disciplinary action as ~~described in (i)(4)(B)~~ against the  
31 subordinate judicial officer.

32  
33 (4) After completing the preliminary investigation, the presiding judge must, in his or  
34 her discretion:

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36 (A) ~~Terminate the investigation and c~~Close action on the complaint if the presiding  
37 judge finds the complaint lacks merit; ~~or~~

38  
39 (B) ~~Terminate the investigation and close action on the complaint by taking~~  
40 ~~appropriate informal action, which may include a reprimand or warning to the~~  
41 ~~subordinate judicial officer, if the presiding judge finds a basis for taking~~  
42 ~~informal action; or~~ Impose discipline; or



1 (C) Proceed with a formal investigation under (j) if the presiding judge finds a  
2 basis for proceeding further. Take other appropriate action.

3  
4 (5) If the presiding judge terminates the investigation and closes action on the complaint,  
5 the presiding judge must:

6  
7 (A) Notify the complainant in writing of the decision to close the investigation on  
8 the complaint. The notice must include the information required under (l); and

9  
10 (B) Advise the subordinate judicial officer in writing of the disposition.

11  
12 **(j) Complaints requiring formal investigation**

13  
14 (1) If after a preliminary investigation the presiding judge finds a basis for proceeding  
15 with the investigation, the presiding judge must conduct a formal investigation  
16 appropriate to the nature of the complaint.

17  
18 (A) The investigation may include interviews of witnesses and a review of court  
19 records.

20  
21 (B) As soon as practicable, the presiding judge must give the subordinate judicial  
22 officer a copy of the complaint or a summary of its allegations and allow the  
23 subordinate judicial officer an opportunity to respond.

24  
25 (2) Within 10 days after the completion of the investigation or as soon thereafter as is  
26 reasonably possible, the presiding judge must give the subordinate judicial officer  
27 the following in writing:

28  
29 (A) Notice of the intended final action on the complaint; and

30  
31 (B) The facts and other information forming the basis for the proposed action and  
32 the source of the facts and information, sufficient to allow a meaningful  
33 response to the allegations.

34  
35 (3) Final action on the complaint may include:

36  
37 (A) A finding that no further action need be taken on the complaint;

38  
39 (B) An oral or written warning to the subordinate judicial officer;

40  
41 (C) A private written reprimand to the subordinate judicial officer;

42  
43 (D) A public written reprimand to the subordinate judicial officer;

1           ~~(E) Suspension of the subordinate judicial officer;~~

2  
3           ~~(F) Termination of the subordinate judicial officer; and~~

4  
5           ~~(G) Any other action the court may deem appropriate.~~

6  
7           (4) ~~The notice of the intended final action on the complaint in (j)(2)(A) must include the~~  
8           ~~following advice:~~

9  
10           ~~(A) The subordinate judicial officer may request an opportunity to respond within~~  
11           ~~10 days after service of the notice; and~~

12  
13           ~~(B) If the subordinate judicial officer does not request an opportunity to respond~~  
14           ~~within 10 days after service of the notice, the proposed action will become~~  
15           ~~final.~~

16  
17           ~~(5) If the subordinate judicial officer requests an opportunity to respond, the presiding~~  
18           ~~judge should allow the subordinate judicial officer an opportunity to respond to the~~  
19           ~~notice of the intended final action, either orally or in writing as specified by the~~  
20           ~~presiding judge, in accordance with local rules.~~

21  
22           ~~(6)(5) Within 10 days after the subordinate judicial officer has responded, If the presiding~~  
23           ~~judge is aware that the subordinate judicial officer knows of the complaint, the~~  
24           ~~presiding judge must give the subordinate judicial officer and the complainant~~  
25           ~~written notice of the final action taken on the complaint. The notice to the~~  
26           ~~complainant must include the information required under (l).~~

27  
28           ~~(7) If the subordinate judicial officer does not request or has not been given an~~  
29           ~~opportunity to respond, the presiding judge must promptly give written notice of the~~  
30           ~~final action to the complainant. The notice must include the information required~~  
31           ~~under (l).~~

32  
33           ~~(k)~~**(j) Notice to the Commission on Judicial Performance**

34  
35           (1) If a court disciplines a subordinate judicial officer by written reprimand ~~under~~  
36           ~~(i)(4)(B) or (j)(3)(C) or (D)~~, suspension, or ~~removal~~ termination for conduct that, if  
37           alleged against a judge, would be within the jurisdiction of the commission under  
38           article VI, section 18 of the California Constitution, the presiding judge must  
39           promptly forward to the commission a copy of the portions of the court file that  
40           reasonably reflect the basis of the action taken by the court, including the complaint  
41           or allegations of misconduct and the subordinate judicial officer's response. This  
42           provision is applicable even when the disciplinary action does not result from a  
43           written complaint.

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(2) If a subordinate judicial officer resigns (A) while an ~~preliminary or formal~~ investigation under (i) ~~or (j)~~ is pending concerning conduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, or (B) under circumstances that would lead a reasonable person to conclude that the resignation was due, at least in part, to a complaint or allegation of misconduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, the presiding judge must, within 15 days of the resignation or as soon thereafter as is reasonably possible, forward to the commission the entire court file on any pending complaint about or allegation of misconduct committed by the subordinate judicial officer.

(3) \*\*\*

~~(k)~~ **Notice of final court action**

(1) When the court has completed its action on a complaint, the presiding judge must promptly notify the complainant, if known, and the subordinate judicial officer of the final court action.

(2) \*\*\*